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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 150

J. W. KIRKLAND, ET AL., PETITIONERS

v.

ATLANTIC COAST LINE RAILROAD COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR NATIONAL MEDIATION BOARD AND FRANK P. DOUGLASS IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia (R. 17-18) is reported in 167 F. 2d 529. The District Court of the United States for the District of Columbia rendered no opinion in support of its decree dismissing petitioners' bill of complaint (R. 16).

JURISDICTION

The judgment of the Court of Appeals was entered April 19, 1948 (R. 19). The petition for writ of certiorari was filed July 12, 1948. The jurisdiction of this Court is invoked under Section 240 of the Judicial Code (28 U. S. C. 347).

QUESTION PRESENTED

Whether the district court has jurisdiction to review a certification of collective bargaining representatives made by the National Mediation Board under Section 2, Ninth of the Railway Labor Act.

STATUTES INVOLVED

Section 2, Ninth of the Railway Labor Act, 44 Stat. 577, amended by the Act of June 21, 1934, 48 Stat. 1185, 1188, 45 U. S. C. 152, provides:

> Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative

of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

Section 10 of the Administrative Procedure Act of June 11, 1946, 60 Stat. 243, 5 U. S. C. 1009, provides so far as pertinent:

Sec. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant

statute, shall be entitled to judicial review thereof.

STATEMENT

Petitioners, 76 of the approximately 95 locomotive engineers of the Western Division of the Atlantic Coast Line Railroad Company, filed a complaint in the District Court for the District of Columbia for a declaratory judgment against Atlantic Coast Line, the Grand International Brotherhood of Locomotive Engineers, the National Mediation Board, and Frank P. Douglass, its chairman (R. 2-10). The complaint alleged the following:

The railroad property now comprising the Western Division of Atlantic Coast Line was from 1926 to January 1, 1946, the property of the Atlanta, Birmingham and Coast Railroad Company, a separate corporate entity whose common shares were held by Atlantic Coast Line. Before and during this period, the engineers employed on the property were represented by the Brotherhood of Locomotive Firemen and Engineers. Atlantic Coast Line acquired the property of its subsidiary on January 1, 1946, and thereafter the respondent Brotherhood of Locomotive Engineers requested the Board to investigate a dispute among the engineers of the Atlantic Coast Line as to who were their representatives. The purpose of this request was to bring about an election participated in by all engineers of the Atlantic Coast Line, the result of which was a foregone conclusion since Western

Division engineers were greatly outnumbered by other engineers of the Atlantic Coast Line. (R. 4-7)

The Board, proceeding on a construction that the Railway Labor Act required carrier-wide bargaining units, held an election participated in by all engineers of the railroad, and certified the respondent Brotherhood, previously the representative of engineers other than those employed on the Western Division, as the representative of all engineers employed by the Atlantic Coast Line (R. 7-8). If this certification is permitted to take effect, petitioners will be deprived of long-standing rights to bargain collectively through representatives of their own choosing, and may lose important benefits and rights arising from the previous maintenance of seniority rosters exclusively for engineers of the Western Division (R. 5-6, 9).

Based on these allegations, petitioners asked that the court declare (1) that the Board erred in deciding that the Railway Labor Act requires organization of a craft of employees on a carrier-wide basis and (2) that the Board was without jurisdiction to hold the election and to certify respondent Brotherhood as petitioners' representative (R. 10).

Motions to dismiss for lack of jurisdiction and for failure to state a cause of action, filed by respondent Brotherhood (R. 14-15) and by respond-

ents National Mediation Board and Frank P. Douglass (R. 15), were granted by the District Court and the complaint was dismissed with prejudice (R. 16). The Court of Appeals affirmed the dismissal in a *per curiam* opinion, holding that the certification of bargaining representatives by the Board under Section 2, Ninth of the Railway Labor Act is not subject to judicial review (R. 17-18).

ARGUMENT

This Court held in *Switchmen's Union* v. *National Mediation Board,* 320 U. S. 297, that courts lack jurisdiction to review the Mediation Board's certifications of bargaining representatives under Section 2, Ninth of the Railway Labor Act. Petitioners concede that this holding is dispositive of the present case unless a different answer is required by Section 10 of the Administrative Procedure Act, granting judicial review to persons suffering legal wrong from administrative agency actions "except so far as statutes preclude judicial review or agency action is by law committed to agency discretion." We submit that the language of this provision, and its legislative history, convincingly demonstrate that Congress had before it the question whether the holding of *Switchmen's Union* was to be overturned by the Administrative Procedure Act, and answered it in the negative.

The Act, as originally introduced in both Senate and House, provided in Section 10 for judicial re-

view of agency action "except so far as statutes *expressly* preclude judicial review—" (Italics added) (S. 7, H. R. 1203, 79th Cong., 1st Sess.). Had Section 10 been enacted in this form, it would be hard to contend that the rule of the *Switchmen's* case had not been overruled. The Senate Judiciary Committee, to which S. 7 was referred, issued a preliminary print of the bill in which the word "expressly" was deleted, without specific explanation of the deletion, but with the general observation that the pertinent clause of Section 10 was intended to "state the two present general or basic situations in which judicial review is precluded."[1] The significance of the deletion, and the manner in which it is controlling of the present inquiry, is apparent from the Attorney General's comments on the bill subsequently submitted to the Chairmen of both Judiciary Committees. The Attorney General said: (History, pp. 229, 230, 413):

> Section 10: This section, in general, declares the existing law concerning judicial review. It provides for judicial review except insofar as statutes preclude it, or insofar as agency action is by law committed to agency discretion. A statute may in terms preclude judicial review or be interpreted as manifesting a congressional intention to preclude judicial review. Examples of such interpretation

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[1] "Administrative Procedure Act; Legislative History," S. Doc. 248, 79th Cong., 2nd Sess., p. 36. We shall hereafter refer to this compilation as "History."

are: *Switchmen's Union of North America* v. *National Mediation Board* (320 U. S. 297);
* * *

The Attorney General's comments were attached as an appendix to the report of the Senate Committee on the Judiciary (S. Rep. 752, 79th Cong., 1st Sess. (History, 191, 223)). This was the only specific reference to the *Switchmen's* doctrine during the legislative history of the Act. It is significant, however, inasmuch as the Senate Committee report was before both Houses of Congress when they debated and passed the statute. In the absence of any indications to the contrary, the Attorney General's interpretative comments, incorporated in the report of the Senate Committee and referred to in the report of the House Committee (H. Rep. 1980, 79th Cong., 2d Sess. (History, 249)), must be taken to represent the understanding of the committees that considered the legislation. *American Stevedores* v. *Porello,* 330 U. S. 446, 452.[2]

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[2] The extracts quoted by petitioners from the legislative history (Pet. 8-9, Br. 31-32, 35, 37-39, 43-46), do not contradict the Attorney General's construction of Section 10. They are general statements to the effect that the Administrative Procedure Act is designed to provide a most comprehensive judicial review of agency action, that there are but few instances where review is withheld, and the like. Moreover, when petitioners quote from Senator McCarran's remarks on the floor of the Senate (Br. 43-44), they overlook the fact that immediately prior to making the statement upon which they rely the Senator said that the bill would not interfere with any statute "denying a review" because the Senate Judiciary Committee was "not setting ourselves up to abro-

Congress gave further explicit evidence that Section 10 of the Administrative Procedure Act was not intended to alter existing law as to judicial review of certification proceedings in representation cases. The Senate Judiciary Committee Print of June 1945 refuted an objection that the language of the bill might provide for judicial review of certification proceedings by the National Labor Relations Board in representation cases. It noted that this question had not yet been authoratively determined, and declined to prejudge the question by specifically excepting certification proceedings from review.[3] (History, p. 38). Here again Congress gave express evidence of its intention that the questions of reviewability of particular agency actions would be dependent upon the particular statutes involved, as construed by decisions of this Court.

Petitioners' assertions that this Court's decision in the *Switchmen's* case was brought to the attention of the Congress (particularly the Senate) during the debates on the administrative procedure bill, with the comment that Section 10 was intended to overrule that decision (Pet. 9, Br. 44-46), are entirely incorrect. In fact, the *Switchmen's*

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gate acts of Congress." History, p. 311. For further remarks in the course of debate in both Houses recognizing that Section 10 was declaratory of existing law, see History, pp. 319, 323, 326, 374-375, 384.

[3] This history provides a complete answer to petitioners' efforts to draw support from the fact that certifications of employee representatives are specifically excepted from Section 5 of the Act, but not from Section 10.

case was not referred to during the debate in either House. The cases referred to in the discussion between Senators Austin and McCarran relate only to the question of who has standing to obtain judicial review. (History, pp. 310-311). As a result, nothing in the legislative history contradicts the Attorney General's statement that under Section 10 it is still the duty of the courts, where a particular statute is silent as to judicial review, to determine from the context, as in the *Switchmen's* and other cases, whether such review is consistent with and will further the purpose of Congress.

This decision of the court below is consistent with the general pattern of Section 10. That section on its face is a general restatement of the principles of judicial review as evolved by Congress and the courts over many years. It does not purport to answer all of the detailed and often difficult questions that arise as to what is reviewable and by whom, when, and in what court. Those complexities, which have often been alluded to by this Court, e.g. *Stark* v. *Wickard,* 321 U. S. 288, 306, 312, were well known to the draftsmen of the Administrative Procedure Act. The Act was drafted largely by representatives of the American Bar Association working with representatives of the Department of Justice under the supervision of the Judiciary Committees. The Attorney General's uncontradicted views as to the meaning of

Section 10 in relation to the rule of the *Switchmen's* case have been referred to above. In a similar but more general vein, Mr. Carl McFarland, Chairman of the American Bar Association's Special Committee on Administrative Law, testified before the House Committee on the Judiciary, as follows (History, pp. 83-84):

> But any provision for review will be disappointing to many people. We think there must be a section on judicial review within the statute; we think it will be very helpful; we think it will simplify the subject to the extent of indicating to the lawyer or businessman or farmer or laborer who may be involved that his rights of review are of such and such a kind; but we do not believe the principle of review or the extent of review can or should be greatly altered. We think that the basic exception of administrative discretion should be preserved, must be preserved. We believe that about all the statute should or could do would be to state the form of action, the type of acts that are reviewable in accordance with the present law, the authority of the courts to grant temporary relief so that review may be useful, but that the scope of review should be as it now is.

Such an approach to the subject of judicial review recognizes the inevitable role of the courts in applying the general principles of Section 10 to an infinite variety of situations. Thus, looking to what Congress actually did in contrast to gen-

eralized statements, the dropping of the word "express" from the introductory clause of Section 10 can only mean that Congress expects that in its silence the courts will determine as before whether judicial review of agency action is consonant with the legislative purpose. In fact, this Court, in *Ludecke* v. *Watkins,* decided June 21, 1948, has already so decided, in holding that the Alien Enemy Act of 1798, which is silent as to judicial review, precludes review of enemy alien removal orders. The Court said (slip sheet, p. 3): "As Congress explicitly recognized in the recent Administrative Procedure Act, some statutes "preclude judicial review." * * * Barring questions of interpretation and constitutionality, the Alien Enemy Act of 1798 is such a statute. *Its terms, purpose, and construction leave no doubt.*" (Italics supplied).

Petitioners argue that this Court did not hold in *Switchmen's Union* that Section 2, Ninth of the Railway Labor Act "precluded" judicial review, but merely declined to "infer" a right to review because of factors largely outside the face of the statute. But, contrary to petitioners' contention, the holding of this Court was that the language of the statute, read in the light of its legislative history, disclosed Congressional intention to preclude judicial review and accord finality to administrative action taken under Section 2, Ninth. 320 U. S. at 305-306.

There is no conflict, requiring review by this

Court, between the decision of the court below and that of the Circuit Court of Appeals for the Third Circuit in *United States ex rel. Trinler* v. *Carusi*, 166 F. 2d 457. The question in the *Trinler* case, whether under the Administrative Procedure Act a statute which expressly provides for administrative finality may be read as not precluding review because of decisions permitting review by way of habeas corpus, is not the question here, whether a statute must forbid review in explicit terms. Indeed, the action of the Third Circuit in looking to judicial decisions and beyond the precise words of the immediate statute to determine whether "statutes preclude judicial review" is obviously consistent with that of the court below in doing the same thing—even though in the one case such use of sources other than the words of the statute to determine its meaning resulted in review, and in the other it did not.[4] Furthermore, a decision interpreting the deportation statutes and this Court's decisions with respect to them as not precluding review can hardly be said to conflict with a decision that the Railway Labor Act, as construed, does preclude review. In any event, on

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[4] The Government is of the view that the deportation statute and the habeas corpus cases, which read together permit a limited review, preclude review otherwise, and that the opening clause of Section 10 of the Procedure Act—"except *so far as* statutes preclude judicial review"—has the effect of preventing review in deportation cases to a greater extent than previously. For this reason the Government thought the *Trinler* opinion erroneous, although review by this Court became impossible because of the abatement of the proceeding.

July 8, 1948, the Third Circuit held that the proceeding had abated, vacated its judgment, and remanded the cause to the District Court for dismissal.

In the instant case the court below made no attempt to determine whether the Administrative Procedure Act generally broadens or changes the scope of review of agency action (R. 18). It decided only that under Section 2, Ninth of the Railway Labor Act, Congress has precluded review of the agency action involved, so that Section 10 of the Administrative Procedure Act, by its terms, is inapplicable to such action.

CONCLUSION

The decision below is correct. There is no conflict among decisions of the Circuit Courts of Appeals, and no question requiring review by this Court is presented. It is, therefore, respectfully submitted that the petition for a writ of certiorari should be denied.

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